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Supreme Court, U.S.
FILED
DEC 16 1993
OFFICE OF THE CLERK

No. 93-767

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOSEPH R. FORTNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the military judge prejudiced petitioner by permitting the prosecutor to question petitioner about a statement he made to an investigating officer, which petitioner contends could have been taken as indicating that petitioner had undergone and failed a polygraph examination.

2. Whether the method of appointing military officers to duty as trial and appellate judges, and the lack of tenure for those judges, violate the Constitution.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-6a) is reported at 37 M.J. 349. The opinion of the Air Force Court of Military Review (Pet. App. 7a-18a) is reported at 34 M.J. 836.

JURISDICTION

The judgment of the of Military Appeals was entered on August 18, 1993. The petition for a writ of certiorari was filed on November 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Petitioner, a member of the United States Air Force, was convicted after a general court-martial before a military judge sitting alone. The judge found petitioner guilty of two specifications of carnal knowledge, in violation of Article 120(b) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920(b). Petitioner was sentenced to a bad conduct discharge, confinement and forfeiture of $400 pay per month for one year, and reduction to the lowest enlisted grade. The convening authority approved the sentence. Pet. App. 2a & n.2. The Air Force Court of Military Review set aside petitioner's conviction on one of the specifications and dismissed that specification for insufficient evidence. Reassessing the sentence, that court reduced it to a bad conduct discharge, confinement for one year, and reduction to the lowest enlisted grade. *Id.* at 2a n.2, 15a-16a. The Court of Military Appeals affirmed. *Id.* at 1a-6a.

The charge that was sustained was based principally on the testimony of the victim, the 15-year-old daughter of petitioner's brother, in whose home petitioner was staying at the time of the offense. The victim testified that she engaged in consensual sexual intercourse with petitioner. A cousin of petitioner's testified that petitioner made a statement about having had sexual relations with the victim. The cousin also testified that petitioner and petitioner's mother placed pressure on him not to talk with investigators who were looking into the matter. Petitioner testified in his own behalf and denied that the incident ever occurred. Pet. App. 2a, 10a-11a.

During the cross-examination of petitioner at his court-martial, the following colloquy took place (Tr. 164-165):

TC [the prosecutor]: Do you remember having a conversation with Agent Pulliam at Travis Air Force Base? Remember talking to him.

ADC [assistant defense counsel]: Your Honor, I'm going to object at this point.

TC: I'm not going to go into any matters that are inadmissible.

ADC: Your honor, I would still object. I don't know where counsel is going; and if she's getting—well, let me let Captain Dowling address that matter because he was on the case at the time before I was.

DC [defense counsel]: Your Honor, I think defense's position is that we're just getting into an area dealing with a post-polygraph conversation between the special agent from the OSI and Airman Fortner which was told to them in letter and by me, myself, over the phone that no such post-polygraph conversation should occur and that would be our objection.

MJ [military judge]: You are asserting that you did communicate that to OSI agents that they were not to have a post-polygraph conversation with your client, is that right?

DC: In letter form and over the phone.

MJ: Then I'm going to sustain the objection. If they did that contrary to your instructions, I'll sustain that objection.

TC: One moment, sir.

MJ: Well, wait a minute. What is your position? Was he under a proper rights advisement?

TC: He was under rights advisement, sir, and it wasn't an interview. I believe the proper term is a post-polygraph interview and this was not an interview, it was a comment and an answer which is what I was trying to—the polygrapher asked him no questions and it was —

MJ: I'll permit the question, but feel free to renew; and if it is improper, feel free to renew your objection and I can, of course, disregard because this is a bench trial. Go ahead.

TC: Do you recall Agent Pulliam making the comment that maybe it was time to tell your attorneys the truth? Do you remember him saying that?

ACC [the accused]: His exact words were, I think you should go back and tell your attorney the truth.

TC: And do you remember saying, yeah, maybe I should?

ACC: I said, yes, I will.

TC: But you didn't, did you?

ACC: Yes, I have been, and I'm still maintaining the truth, ma'am.

TC: Thank you, nothing further.

MJ: Is there redirect?

ADC: Your Honor, prior to redirect, what I'd like to do is I would like to reimpose that objection that

there were strict instructions that there was to be no post-polygraph interview. While this was not a question per se, it falls into that category of a statement obviously meant to elicit a response and while we don't feel that the response is necessarily incriminating, it is a statement or technically, a statement that we feel was made in an interrogation setting.

MJ: No, I think it's admissible. I agree with you, and I'm not sure it's probative of anything, but I think it's admissible evidence, so I'm going to overrule the objection.

ARGUMENT

1. Petitioner argues (Pet. 7-11) that the government improperly introduced evidence suggesting that petitioner had taken and failed a polygraph examination.

Petitioner argues that evidence of the polygraph examination was inadmissible.* Petitioner's analysis of the admissibility of polygraph evidence is irrelevant, however, because evidence of petitioner's polygraph examination was never offered or admitted at trial. The

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* This case was tried prior to July 6, 1991, the effective date of Mil. R. Evid. 707, which bans from admission at courts-martial "the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination." Exec. Order No. 12,767, 3 C.F.R. 334, 339-340, 341 (1992). Prior to the effective date of that rule, the Court of Military Appeals had held that polygraph evidence was neither per se inadmissible, see *United States* v. *Gipson*, 24 M.J. 246 (C.M.A. 1987), nor per se admissible, see *United States* v. *West*, 27 M.J. 223, 225 (C.M.A. 1988). Rather, the court had held that polygraph evidence must "be evaluated under the entire spectrum of evidentiary rules." *Ibid.* See also *United States* v. *McKinnie*, 29 M.J. 825 (A.C.M.R. 1989), aff'd, 32 M.J. 141 (C.M.A. 1991).

question asked by the prosecutor did not state or suggest that petitioner had taken a polygraph examination. The question simply asked whether petitioner had been told by a particular law enforcement agent that he should tell his attorney the truth. Petitioner testified that he replied to the agent, "[Y]es, I will." When the prosecutor then asked, "But you didn't, did you?" petitioner replied, "Yes, I have been, and I'm still maintaining the truth." Tr. 165.

Nothing about that exchange suggests that petitioner had taken a polygraph examination, much less that the examiner had concluded that petitioner had failed the examination. It was only the comments of petitioner's counsel in arguing an objection to that line of questioning that indicated that petitioner had taken a polygraph examination and that the exchange with the agent took place after the examination.

In any event, the military judge observed at trial that it was doubtful that petitioner's statement was probative of anything. Accordingly, because this was a bench trial, it is apparent from the judge's comments, as well as the ambiguous nature of petitioner's remark, that the admission of the comment could not have prejudiced petitioner, even if petitioner's objection to the admission of the statement should have been sustained. The Court of Military Appeals was therefore correct in concluding, Pet. App. 5a-6a, that any error in the admission of the evidence of petitioner's response to the agent was nonprejudicial. See *United States* v. *Ortiz*, 34 M.J. 831 (A.F.C.M.R. 1992); *United States* v. *Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991), cert. denied, 113 S. Ct. 596 (1992); *United States* v. *Burns*, 25 M.J. 817 (A.F.C.M.R.), petition denied, 27 M.J. 1 (C.M.A. 1988); *United States* v. *Bledsoe*, 19 M.J. 641 (A.F.C.M.R. 1984), aff'd, 26 M.J. 97 (C.M.A.), cert. denied, 488 U.S. 849 (1988).

2. Petitioner next argues (Pet. 12-15) that the military trial and appellate judges in his case were appointed in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, and that the lack of fixed tenure for the judges in his case rendered the proceedings against him fundamentally unfair.

Those questions are not materially different from the questions presented in *Weiss* v. *United States*, No. 92-1482 (argued Nov. 3, 1993), which is pending before the Court. Accordingly, we believe that the petition should be held until the Court has decided *Weiss* and should then be disposed of as appropriate in light of the Court's decision in that case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Weiss* v. *United States*, No. 92-1482, and should then be disposed of as appropriate in light of the Court's decision in that case. In all other respects, the petition should be denied.

Respectfully submitted.

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